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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 75.

ELMER UVEGES, Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR RESPONDENT.

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INDEX TO BRIEF.

	PAGE
Opinions in Courts Below	1
Jurisdiction	1
Counter-Statement of Case	2
Summary of Argument	3
Argument	4
1. Factual Matters Not of Record May Not Be Made the Basis of a Determination by This Court	4
2. Matters of Local Law May Not Be Decided by This Court	5
3. Petitioner Was Not Denied Due Process of Law by Reason of the Fact That the State Did Not Appoint Counsel to Represent Him at the Proceedings Resulting in His Imprisonment	6

TABLE OF CASES.

Betts v. Brady, 316 US 455, 464, 465, 86 L. ed. 1595, 1603 8

Bute v. Illinois, 68 S. Ct. 763, 92 L. ed. 735 ..... 8, 9

Carter v. Illinois, 329 US 173, 67 S. Ct. 216 7

Commonwealth v. Uveges, 161 Pa. Superior Ct. 58, 59 5

161 Pa. Superior XXV 5

De Meerler v. Michigan, 313 Mich. 548, 21 N.W. 849; 329 US 663, 91 L. ed. 584 ..... 9, 10

Foster v. Illinois, 332 US 134, 135, 139, 91 L. ed. 1955, 1957, 1959 ..... 7, 8

PAGE

Mooney v. Holohan, 294 US 103, 79 L. ed. 791, 55 S. Ct. 340, 98 ALR 406 ..... 7, 11
Powell v. Alabama, 287 US 45, 77 L. ed. 158 ..... 6, 9
Rice v. Olson, 324 US 786, 89 L. ed. 1367 9
Smith v. O'Grady, 312 US 329, 85 L. ed. 859 9
Tomkins v. Missouri, 323 US 485, 89 L. ed. 407 9
United States v. Ragen, 166 F. 2d 977 5
White v. Ragen, 324 US 760, 89 L. ed. 1348 9
Williams v. Kaiser, 323 US 471, 89 L. ed. 398 9

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OPINIONS IN COURTS BELOW.

The opinion of the Superior Court of Pennsylvania was officially reported in 161 Pa. Superior Ct. 58. A petition for allocatur to the Supreme Court of Pennsylvania was refused without opinion 161 Pa. Superior Ct. XXV.

JURISDICTION.

Certiorari was granted by this Court on 7 June 1948 pursuant to jurisdiction conferred on it by Section 237, (b) of the Judicial Code, as amended, 28 U.S.C.A. Section 344 (b).

COUNTER-STATEMENT OF CASE.

In 1938 the petitioner, then 17 years of age, and a confederate were charged with a series of burglaries and related crimes. The charges against the two defendants numbered forty-eight burglaries, seven charges of violation of the firearms act, two charges of pointing firearms and one charge of felonious assault. The confederate was also charged with the commission of a number of additional burglaries without the petitioner's assistance.

The two defendants plead guilty and were given sentences of five to ten years on each of four indictments. R. 24, 26, 28, 30. Sentences were suspended on the charges contained in the other indictments, R. 32, 34, 36, 38, 40. On pages 41 to 45 of the record under the designation Stenographer's Notes, there is an account of the proceedings which resulted in the confinement of the accused persons.

Subsequently, in 1946, the petitioner filed in the Court of Common Pleas of Allegheny County an application for a writ of *habeas corpus*. R. 4. The writ was denied without a hearing (R. 7, 8); and upon appeal, the Superior Court of Pennsylvania affirmed the decision of the court below, 161 Pa. Superior Ct. 58, R. 11. The petitioner then filed with the Supreme Court of Pennsylvania a petition for allowance of an appeal, R. 15. The right to appeal being denied, the petitioner petitioned this court for a writ of certiorari. This petition was allowed and the case was ordered down for argument, R. 45.

Although the petitioner has advanced numerous contentions it would seem, for reasons set forth in some detail in the Argument, the basic question to be decided by this court is whether or not under the circumstances

here present petitioner was denied due process of law by reason of his not being represented by counsel at the proceedings which resulted in his confinement.

SUMMARY OF ARGUMENT.

1. Petitioner asserts certain factual claims which were not previously presented to or considered by the Supreme Court of Pennsylvania. Such allegations being dehors the record may not be made the basis of a decision by this Court.

2. Petitioner contends that certain proceedures followed by the Pennsylvania Courts were not in accord with the statutory and decisional law of Pennsylvania. This contention raises no federal constitutional question and hence must be decided by the Supreme Court of Pennsylvania and not by this Court.

3. The basic question of this case is whether the petitioner was denied due process of law by reason of the fact that the Commonwealth of Pennsylvania did not appoint Counsel to represent him in the proceedings leading to his imprisonment. It is the contention of the respondent that the federal Constitution did not require that the state appoint Counsel to represent this accused since

(A) The requirement of the 6th Amendment to the federal constitution that the accused be represented by counsel in *all* criminal cases does not apply to the states and

(B) It is only in a capital case or under other special circumstances *not here present* that a state is required by the 14th Amendment to the Federal Constitution to appoint counsel to represent the accused.

ARGUMENT.

1. Factual Matters Not of Record May Not Be Made the Basis of a Determination by This Court.

This case was initiated by a petition for *habeas corpus* presented to the Court of Common Pleas of Allegheny County, Pennsylvania. Upon appeal, the case was decided by the Superior Court of Pennsylvania. 161 Pa. Superior Ct. 58. R. 11. A petition for *allocatur* was presented to the Supreme Court of Pennsylvania, but that court refused to hear the case, thereby affirming the Superior Court decision. R. 15, 21. Subsequently, a petition for a writ of certiorari was presented to and granted by the Supreme Court of the United States. R. 45. The petition to the Supreme Court of the United States contained allegations which were not litigated in the Pennsylvania Courts. The apparent purpose of the factual additions was to bring the case within the factual grounds upon which certain recent cases were decided. In his brief, presented to this court, the petitioner has asserted further additional facts which were not considered by the courts below.

Factual matters not of record and which have never been litigated in any of the Pennsylvania Courts include the following:

1) that petitioner was held *incommunicado* for almost two weeks between his arrest and trial
2) that petitioner was shunted from one police station to another to prevent his contacting family and friends
3) that petitioner requested counsel and that his request was denied

4) that the District Attorney misinformed the sentencing judge

5) that petitioner was advised that if the Commonwealth were put to the expense of trial, a sentence of not less than 20 years was certain to follow.

There is no basis for accepting these various new allegations. If they were to be accepted, this appellate court would be required to decide "a case" never litigated in any of the Courts of Pennsylvania.

2. Matters of Local Law May Not Be Decided by This Court.

Counsel for the petitioner has attacked the validity of the indictments under which the petitioner was sentenced. He contends (1) that, under Pennsylvania law, the District Attorney is required to sign the particular indictments, (2) that under Pennsylvania law, defendant is required to sign a plea of guilty on such indictments.

These contentions involve decisions as to what constitutes proper procedure under state law. They raise Pennsylvania questions—not Federal questions. Neither the first of petitioners contentions which was not previously considered by the Pennsylvania Courts, nor the second contention, which was decided adversely to petitioner (*Com. v. Uveges,* 161 Pa. Superior Ct. 58 p. 59 and 161 Pa. Superior XXV) is properly in issue here. The following comments, contained in the opinion of the *United States v. Ragen,* 166 F. 2d 977 at 981, are pertinent:

"When we condemn a states exercise of its jurisdiction and hold that the exercise of its powers is not

in accordance with due process, we are in effect trying the States. It is State action that is on trial, and a decent regard for the coordinate power of the two governments requires that we give due process to the State. That is the reason that in habeas corpus the relator must first show that he has exhausted his state remedies to open the way for the Federal Courts to try the State's exercise of its sovereign power."

It is true, of course, as implied in the above quotation that the Federal Courts may call into question the constitutionality (federal) of any state law, but they may not presume to establish state procedure in the first instance.

3. Petitioner Was Not Denied Due Process of Law by Reason of the Fact That the State Did Not Appoint Counsel to Represent Him at the Proceedings Resulting in His Imprisonment.

The vital question to be decided, and, in our view of the case the only significant question, is whether the accused, under such facts as are properly before this Court, must be represented by counsel in order that the process leading to his confinement may be deemed *due* process.

This court has decided numerous recent cases (beginning with *Powell v. Alabama,* 287 U.S. 45 77, L. ed: 158) in which the duty of the states to appoint counsel has been carefully considered. Certain of the considerations which have been established by these decisions, and which are pertinent to the case at hand, are set forth in the following paragraphs:

1. The Supreme Court of the United States is without jurisdiction to decide "a case" based upon allegations which, heretofore, have not been asserted in any of the courts of the state.

This elementary proposition requires attention only because petitioner's argument gives great emphasis to allegations set forth in paragraph 1 *supra* which are *dehors* the record. It is apparent, however, that in other *habeas corpus* cases, reliance has been placed upon similar assertions not of record. In *Foster v. Illinois,* 332 U.S. 134, 135, 91 L. ed. 1955, 1957, this Court refused to consider such allegations and stated:

> "Since the controversy turns on the legal significance of the circumstances under which the pleas of guilty were accepted, it is important to state them according to the record, which for purposes of this proceeding is binding upon the Illinois Supreme Court and therefore upon this Court",

and elsewhere in the same opinion (332 U.S. 139, 91 L. ed. at 1959) this Court stated:

> "Insofar as the sentences in this case are attacked on claims which were not open for consideration on the Common Law record, which alone was before the Illinois Court * * * they are not open here. *Carter v. Illionois,* 329 U.S. 173, ante 172, 67 S. Ct. 216. They must be raised by whatever procedure Illinois may provide or in default of relief by appropriate Illinois proceedings, by a new claim of denial of due process for want of such relief. See *Mooney v. Holohan,* 294 U.S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 ALR 406."

2. The due process clause of the fourteenth amendment to the federal constitution does not require that the states follow the same rules of procedure which the sixth amendment requires of the federal government. The states are not required to appoint counsel to represent the accused in *all* criminal cases. This doctrine is succinctly stated in *Foster v. Illinois,* 332 U.S. at 136-137, 91 L. ed. at 1957-1958 wherein the court states:

> "The due process of law clause which the fourteenth amendment exacts from the states is a conception of fundamental justice * * * It is not satisfied by merely formal procedural correctness, nor is it confined by any absolute rule such as that which the sixth amendment contains in securing to an accused 'the assistance of counsel for his defense'. By virtue of that provision, counsel must be furnished to an indigent defendant, prosecuted in a Federal Court in every case, whatever the circumstances * * * Prosecutions in State Courts are not subject to this fixed requirement, so we have held upon fullest consideration. *Betts v. Brady,* 316 US 455, 464, 465, 86 L. ed. 1595, 1603."

Bute v. Illinois, 68 S. Ct. 763, 781, affirms this same principle.

3. A distinction is drawn between cases involving capital and non-capital crimes. When the offense is non-capital, the states are granted greater freedom to determine by their own rules whether the accused should be represented by counsel. See *Bute v. Illinois,* 68 S. Ct. 763, 781, 782. See also cases therein cited.

4. Due process of law requires that the state appoint counsel to represent the accused in all cases where

he has requested counsel. In the present case, counsel asserts that the accused did request counsel and that the request was denied; however, the alleged request and denial were not alleged in the courts below, are not now in the record, and hence cannot be asserted here in the first instance.

5. The establishment of rules determining when counsel should be appointed to represent an accused is a phase of police power; hence, it is a duty of the state. It is only when the police power is abused in a manner shocking to the conscience that the Federal Courts will intervene under the doctrine of "due process" to declare that a fair trial requires the state to appoint counsel to represent the accused. See *Powell v. Alabama,* 287 US 45, 77 L. ed. 158; *Smith v. O'Grady,* 312 U.S. 329, 85 L. ed. 859; *Williams v. Kaiser,* 323 US, 471, 89 L. ed. 398; *Tomkins v. Missouri,* 323 US 485, 89 L. ed. 407; *White v. Ragen,* 324 US 760, 89 L. ed. 1348; *Rice v. Olson,* 324 US 786, 89 L. ed. 1367; *Bute v. Illinois,* 68 S. Ct. 763, 92 L. ed. 735; *De Meerler v. Michigan;* 329 US 663, 91 L. ed. 584.

A review of certain of the leading cases referred to above indicates that it is only in the most *unusual* circumstances that the federal courts have declared that fourteenth amendment due process clause requires the state to appoint counsel.

In *Powell v. Alabama, supra,* ignorant Negro youths, alone in a strange city, charged with the capital offense of rape upon the persons of white girls, were forced to try their own cases.

In *Rice v. Olson, supra,* the accused was an ignorant Indian, and in addition, there were involved complex

legal questions arising from the fact that the alleged crime had occurred on Indian territory.

In *De Meerler v. Michigan, supra,* according to the portions of the record set forth in the opinion of the Michigan Court, 313 Mich. 548, 21 N.W. 2d 849, there was a hurried hearing, the accused was definitely confused as to whether he should plead guilty, and in fact, the hearing judge almost put words into his mouth.

In the present case, we find no such unusual circumstances. The relevant facts, *as shown by the record,* are these: the petitioner, then a minor aged 17, accused of a long series of burglaries and related crimes, pleaded guilty in open court and was sentenced. The petitioner did not request counsel nor was counsel appointed to represent him at the hearing.

Petitioner also alleges that he was misled by the District Attorney who offered him a light sentence if he would plead guilty. This allegation was raised in the original petition for writ of habeas corpus. R. 4. Apparently, through oversight, no answer to the allegation was made by the District Attorney. See R. 9. The claim was not considered by the Court of Common Pleas of Allegheny County, Pennsylvania, nor by the Superior Court of Pennsylvania, which heard the case on appeal. R. 7, 11, 161 Pa. Superior Ct. 58. The petitioner himself, although he alluded to the claim in veiled language, failed to raise the point in the petition to the Supreme Court of Pennsylvania, R. 15. It would appear, therefore, that as far as their proceedings are concerned, the petitioner has lost the point by default. Having failed to raise the issue in the Supreme Court of Pennsylvania,

he may not now raise it in a proceeding in which he seeks to have the Supreme Court of Pennsylvania decision overruled. The circumstances here present are similar to those involved in the oft-cited case of *Mooney v. Hollohan,* wherein the court stated (294 US at 115, 55 S. Ct. at 340):

> "We do not find that petitioner has applied to the state court for a writ of habeas corpus upon the grounds stated in his petition here. That corrective judicial process has not been invoked and it is not shown to be unavailable. Despite the many proceedings taken on behalf of the petitioner, an application for the perogative writ now asserted to be peculiarly suited to the circumstances disclosed by his petition has not been made to the state court. Orderly procedure, governed by principles we have repeatedly announced, requires that before this court is asked to issue a writ of habeas corpus, in the case of a person held under a state commitment, *recourse should be had to whatever judicial remedy afforded by the state may remain open.*" (Italics ours)

Numerous other claims of irregularity have been asserted, but none of these go to the roots of the case, nor do they establish the contention that the petitioner did not receive fundamental justice. In the paragraphs below brief mention is made of certain of these claims:

Petitioner's counsel has urged that the District Attorney committed error by listing more than one charge on several of the numerous indictments which were filed. The objection goes to the form and not to the merits. No harm whatsoever was done the petitioner since he was given only a suspended sentence on all indictments

containing more than one charge. The indictments on which he was sentenced were correctly drawn.

Counsel has objected to testimony of certain witnesses at the hearing, the objection being that this testimony did not justify conviction. This objection is meaningless. No witnesses were required to convict. The conviction was established by the petitioner's admission that he had committed the wrongs with which he was charged. The only purpose of the testimony was to aid the judge in imposing sentence.

Counsel has alluded to the complexity of the case, but we see nothing unusually complex about burglary. It is one of the oldest crimes, is *malum in se* and not merely *malum prohibitum*, and is recognizable as such by all ages and classes of society. The essense of the crime was explained by the District Attorney in open court, when he explained that Uveges (petitioner) was charged with entering many Pittsburgh homes for the purpose of stealing. He explained that "the loot" had been recovered. Uveges (petitioner) admitted that he *"began to enter dwellings August 16, 1938"* R. 45.

The petitioner's youthfulness has been referred to at length, but whether he was a youth or a man of maturity, it does not appear from the facts of record that counsel could have been of any material assistance to him.

A more serious contention, raised by counsel, is that petitioner intended to plead guilty to one act of burglary only and not to the entire 48 offenses with which he was charged. Once again we must look to the record, and

particularly to the report of the proceedings leading to the petitioner's imprisonment R. 41. We find absolutely nothing in these proceedings to show an intent by petitioner to plead guilty to only one act of burglary. It is apparent, also, that the presiding judge found no such intent for the record shows a sentence on four indictments and the judge has initiated each sentence. R. 24, 26, 28, 30.

Viewed in its entirety, counsel's argument apparently is intended to show a concerted effort by the Judge and other state officials to destroy the petitioner. The facts in issue provide no basis for such an argument. We contend, therefore, that the proceedure followed in this instance by the Commonwealth of Pennsylvania was not at variance with the federal constitutional requirements of *due* process of law.

Respectfully submitted,

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